Order

Michigan Supreme Court
Lansing, Michigan

February 4, 2022

Bridget M. McCormack,
Chief Justice

161911

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

GREGORY WELLS, Personal Representative of the ESTATE OF MICHAEL WELLS,
Plaintiff-Appellant,

v

SC: 161911
COA: 348135
Macomb CC: 2017-003739-NI

STATE FARM FIRE & CASUALTY COMPANY,
Defendant-Appellee,

and

JOSEPH NARRA,
Defendant.

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On January 13, 2022, the Court heard oral argument on the application for leave to appeal the July 16, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE Part II of the Court of Appeals opinion, VACATE the remainder of the opinion, and REMAND this case to that court for further proceedings.

The Court of Appeals acknowledged in Part II of its opinion that the parties had raised in the trial court, and pursued on appeal, the issue of "the applicability [of defendant's] homeowners policy exclusion for bodily injury arising out of the ownership, maintenance, or use of a motor vehicle owned or operated by or rented or loaned to any insured."[1] The Court of Appeals proceeded to hold that this issue was "not properly preserved for appeal because [it] was not decided by the trial court."[2] This was error because the issue was preserved.[3] "Michigan generally follows the 'raise or waive' rule

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[1] *Wells Estate v State Farm Fire & Cas Co*, unpublished per curiam opinion of the Court of Appeals, issued July 16, 2020 (Docket No. 348135), p 11 (quotation marks omitted).

[2] *Id*., citing *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386 (2010).

[3] On direct appeal, the Court of Appeals had the discretion to address this preserved issue. See *Tingley v Kortz*, 262 Mich App 583, 588 (2004).

of appellate review."[4] Therefore, a litigant "preserve[s] an issue for appellate review by raising it in the trial court."[5] In other words, issue-preservation requirements in Michigan only prohibit raising an issue for the first time *on appeal*.[6] But defendant raised this motor-vehicle-exclusion issue in the trial court, and because it did, the issue is preserved despite the trial court's failure to rule on it.[7]

On remand, the Court of Appeals shall consider whether the motor-vehicle-exclusion provision in defendant's policy applies to deny coverage. If the court determines that the motor-vehicle-exclusion provision does apply, then it need not address whether plaintiff pled a covered accident under the policy. But if the court determines that the motor-vehicle-exclusion provision does not apply, then the court should reconsider whether plaintiff pled a covered accident under the policy.

We do not retain jurisdiction.

ZAHRA, J. (*concurring*).

I concur with the Court's order remanding this case to the Court of Appeals for it to consider the properly preserved issue of the applicability of the motor-vehicle-exclusion provision of defendant's homeowners insurance policy. I write separately to highlight certain documents that ought to guide the panel on remand.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8), which required the court to "accept all factual allegations as true, deciding

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[4] *Walters v Nadell*, 481 Mich 377, 387 (2008) (citation omitted).

[5] *Id*. See also *Napier v Jacobs*, 429 Mich 222, 227 (1987) ("A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal."); *Guider v Smith*, 431 Mich 559, 577 (1988) ("Finding no manifest injustice, we decline to depart from our traditional rule that a party waives claims not properly presented for review.").

[6] See *Walters*, 481 Mich at 387 (explaining that "generally a failure to timely raise an issue waives review of that issue on appeal") (quotation marks and citation omitted). See also *Hess v West Bloomfield Twp*, 439 Mich 550, 557 n 6 (1992) (holding that an "issue was not preserved for review by this Court because it was not raised in the trial court"); *Spencer v Black*, 232 Mich 675, 676 (1925) (holding that an issue raised for the first time on appeal was not properly before this Court).

[7] See *Klooster v Charlevoix*, 488 Mich 289, 310 (2011) (counseling that "a party 'should not be punished for the omission of the trial court' "), quoting *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183 (1994). Accord *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227 (2020).

the motion on the pleadings alone."[8] In this case, there is no dispute that defendant's policy and the consent judgment entered by the trial court in plaintiff's underlying action against the insureds are both part of the pleadings; indeed, plaintiff's counsel conceded that very point at oral argument before this Court. I urge the Court of Appeals to closely consider these documents, which may prove critical to resolving the question presented on remand.

[8] *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019). Accord *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999) ("When deciding a motion brought under [MCR 2.116(C)(8)], a court considers only the pleadings."), citing MCR 2.116(G)(5) ("Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9).").